

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHARLES KELLER COOPER JR.,

Plaintiff,

v.

VOLODINOS, et al.,

Defendants.

NO. CV 17-2463-FMO (AGR)

ORDER OF DISMISSAL***I. Procedural History***

On March 30, 2017, Plaintiff, proceeding *pro se* and *in forma pauperis*, filed a complaint under 42 U.S.C. § 1983. (Dkt. No. 1.) Defendant is Los Angeles County Sheriff's Department Deputy Valdovinos-Ocha (sued as "Volodinos"), in his individual and official capacities.

The complaint was based on an incident that occurred on January 3, 2017 at Mens Central Jail. Under "Previous Lawsuits," Plaintiff identified Case No. 16-00088-FMO (AGR).¹ He described his allegations against Valdovinos-Ocha in that action as follows: "Deputy [Valdovinos-Ocha] slams my foot in a cell door

¹ Plaintiff's claims against "Volodinos" were dismissed without prejudice under Rule 4(m) on September 29, 2016, and the entire action was dismissed without prejudice on November 4, 2016 for failure to prosecute. Mail sent to Plaintiff was returned as undeliverable. (Case No. 16-0088-FMO (AGR), Dkt. Nos. 26, 29.) In his current complaint Plaintiff explains he was "missing in action" due to hospitalizations. (Compl. at 2.)

1 while I was housed at 450 Bauchet Street Los Angeles Ca 90012 Dorm (H.O.H.)
2 High Observation Housing.” (*Id.* at 1.)

3 Defendant filed a motion for summary judgment on the assumption that the
4 January 3, 2017 incident was the sole basis for the complaint in this action.² (Dkt.
5 No. 93.) In his opposition, Plaintiff contended that his claims in this action
6 actually arose out of the 2015 incident when Defendant allegedly slammed a door
7 on Plaintiff’s foot. After full briefing, the magistrate judge recommended that the
8 Court grant the Defendant’s motion for summary judgment on the claims based
9 on the January 3, 2017 incident and permit Defendant to file a second motion for
10 summary judgment on the 2015 incident that formed the basis of Plaintiff’s
11 opposition. (Dkt. No. 106.) Defendant thereafter filed a motion for summary
12 judgment on the 2015 incident. (Dkt. No. 110.)

13 On January 31, 2020, this Court granted Defendant’s motion for summary
14 judgment on Plaintiff’s claims arising from the January 3, 2017 incident and
15 referred Defendant’s motion for summary judgment based on the 2015 incident to
16 the magistrate judge. (Dkt. No. 117.)

17 The magistrate judge issued a *Rand* notice for Defendant’s motion for
18 summary judgment on the 2015 incident. (Dkt. No. 111); *Rand v. Rowland*, 154
19 F.3d 952, 955 (9th Cir. 1998) (en banc). The mail was returned as undeliverable
20 by the postal service. (Dkt. No. 116.) Nevertheless, on March 24, 2020, Plaintiff
21 filed a notice of change of address to “homeless status” and listed a phone
22 number. (Dkt. No. 120.) Plaintiff also filed a document stating that he had lost
23 his phone and was “now homeless without a phone.” (Dkt. No. 119.) He stated
24 that he tried to call Defendants “to inform them that I will be writing an opposition
25

26 ² On April 23, 2019, Plaintiff participated in a settlement conference
27 ordered in a different case, *Cooper v. County of Los Angeles*, CV 17-8335 FMO
28 (AGR) (C.D. Cal.) The cases did not settle. (Dkt. No. 97, CV 17-8335.)

1 to the defend[a]nts accusations that I was fighting or in combat with staff
2 involved.” Defendants did not answer, so Plaintiff left a message with the
3 defense lawyers. (*Id.*) Plaintiff asked that the Court not grant Defendant’s motion
4 for summary judgment and “not punish me for lack of resources and for having
5 housing issues.” (*Id.*)

6 On August 10, 2020, Defendant filed an Inquiry and declaration. (Dkt. No.
7 122.) Defense counsel states that he left a voicemail message at the phone
8 number listed in Plaintiff’s last notice of change of address and received no
9 response. Without a phone number or physical address, defense counsel has no
10 way to contact Plaintiff. (Altura Decl. ¶¶ 3-5.)

11 ***II. Inability to Contact Plaintiff***

12 Local Rule 41-6 requires that a Plaintiff proceeding *pro se* must keep the
13 Court apprised of the Plaintiff’s current address. In addition, Local Rule 41-6
14 provides that “the Court may dismiss the action with or without prejudice for want
15 of prosecution” if the Plaintiff fails to notify the Court in writing of Plaintiff’s current
16 address within 15 days after mail is returned as undeliverable by the Postal
17 Service.

18 Plaintiff has failed to notify the court in writing of Plaintiff’s current address
19 within 15 days after mail is returned as undeliverable as required in Local Rule
20 41-6. Neither defense counsel nor the Court is able to contact Plaintiff.

21 In determining whether to dismiss a case for failure to prosecute or failure
22 to comply with court orders, a district court should consider five factors: (1) the
23 public’s interest in expeditious resolution of litigation; (2) the court’s need to
24 manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy
25 favoring the disposition of cases on their merits; and (5) the availability of less
26 drastic sanctions. See *In re Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994) (failure to
27
28

1 prosecute); *Ferdik*, 963 F.2d at 1260-61 (failure to comply with court orders).

2 The first two factors – the public’s interest in expeditious resolution of
3 litigation and the court’s need to manage its docket – weigh in favor of dismissal.
4 Plaintiff has failed to notify the court of his current mailing address and has
5 rendered it difficult if not impossible for the court or defense counsel to contact
6 him. Plaintiff’s conduct hinders the court’s ability to move this case toward
7 disposition.

8 The third factor – prejudice to defendants – weighs in favor of dismissal or
9 is at best neutral. A rebuttable presumption of prejudice to defendants arises
10 when there is a failure to prosecute diligently. *Eisen*, 31 F.3d at 1452-53. That
11 presumption may be rebutted when a plaintiff proffers an excuse for delay.
12 Although plaintiff claims that he is homeless, that does not prevent him from
13 receiving mail. The United States Post Office allows homeless persons to
14 receive mail via a post office box or through its “general delivery” service at the
15 individual’s local post office. (See “Is there Mail Service for the Homeless?” U.S.
16 Postal Service, available at [https://faq.usps.com/s/article/is-there-mail-service-for-](https://faq.usps.com/s/article/is-there-mail-service-for-the-homeless)
17 the-homeless) (last visited Aug. 20, 2020).³ Plaintiff does not explain why he has
18 not attempted to arrange with the postal service to hold mail for him for pickup at
19 one of its local post offices. In short, defense counsel’s inability to contact
20 Plaintiff means that Defendant cannot litigate this case to conclusion.

21 The fourth factor – public policy in favor of deciding cases on their merits –
22 weighs against dismissal. It is, however, a plaintiff’s responsibility to move a case
23 towards a disposition at a reasonable pace and to avoid dilatory tactics. See

24
25 ³ The court takes judicial notice of this page from the U.S. Postal Service
26 website. See *El-Aheidab v. Citibank (S. Dak.), N.A.*, 2012 WL 506473, at *4 (N.D.
27 Cal. 2012) (taking judicial notice of USPS website).
28

1 *Morris v. Morgan Stanley Co.*, 942 F.2d 648, 652 (9th Cir. 1991). Plaintiff has not
2 discharged this responsibility. In these circumstances, the public policy favoring
3 resolution of disputes on the merits does not outweigh Plaintiff's failure to notify
4 the court of a means by which the Court can contact him.

5 The fifth factor – availability of less drastic sanctions – weighs in favor of
6 dismissal, again because Plaintiff has failed to keep the court apprised of his
7 current address or other means of contacting him. See *Carey v. King*, 856 F.2d
8 1439, 1441 (9th Cir. 1988) ("It would be absurd to require the district court to hold
9 a case in abeyance indefinitely just because it is unable, through the plaintiff's
10 own fault, to contact the plaintiff to determine if his reasons for not prosecuting his
11 lawsuit are reasonable or not.").

12 Taking all of the above factors into account, dismissal for failure to
13 prosecute is appropriate. Absent a current address for Plaintiff or other means of
14 contacting him, there is nothing more the court can do.

15 Accordingly, IT IS HEREBY ORDERED that:

16 1. All pending motions are denied as moot.

17 2. This action is dismissed without prejudice. See *Link v. Wabash R.R.*,
18 370 U.S. 626, 629-30, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962). This order is
19 without prejudice to Plaintiff's ability to file a motion to reopen the case within 30
20 days after entry of this order. Failure to file a motion to reopen within 30 days of
21 the filing of this Order shall result in the entry of judgment dismissing the case
22 without prejudice.

23 Dated this 21st day of August, 2020.

24
25 /s/
26 FERNANDO M. OLGUIN
27 UNITED STATES DISTRICT JUDGE
28